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ON

BUYING AND SELLING SECURITIES

THROUGH

A MEMBER OF A STOCK EXCHANGE

By ELIOT NORTON

OF THE NEW YORK BAR

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ON BUYING AND SELLING SECURITIES THROUGH A MEMBER OF A STOCK EXCHANGE.*

During the last hundred years there has been an enormous increase in the indebtedness of corporations and political bodies. This has been accompanied by a corresponding increase in the amount of the securities which are used to evidence the larger part of this indebtedness. These securities have a value which is measured in money, and are being constantly bought and sold. The number of purchases and sales of securities which take place every day throughout the world is enormous. These transactions are of course most numerous wherever money centres. In such places are found *stock-brokers*, so called, who make it their business to act as agents for the many individuals who wish to deal in or with securities. Wherever there are many stockbrokers, it has been found convenient to establish Stock Exchanges. These are in their nature private business associations,† founded to facilitate‡ and regulate dealings in securities, to which only stockbrokers belong. The members elect officers and committees with power to regulate matters connected with the Exchange, the conduct of its members, and the transaction of business. The rules they make are always supplemented by various customs,

* This essay is founded on an article of mine entitled "A Simple Purchase and Sale through a Stockbroker," first published in the *Harvard Law Review* for April, 1895, No. 8, of Vol. VIII.

† Stock Exchanges are not usually incorporated, nor are they to be deemed partnerships; on their nature, see Commercial Tel. Co. *v.* Smith, 47 Hun (N. Y.), 494; Belton *v.* Hatch, 109 N. Y. 596; Clute *v.* Loveland, 68 Cal. 254; Dos Passos on Stock-Brokers and Stock Exchanges, 12–17; 23 Am. & Eng. Enc. of Law, 748, under title "Stock Exchange."

‡ Dos Passos, Preface, page v.

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established among the members, to which is given the same recognition as if they formed part of the rules.

Every Stock Exchange provides a room which is called "the Exchange," or "the floor of the Exchange." The use of this "Exchange" or "floor" is regulated by the constitution, rules, and customs of each Stock Exchange. In general, the rules* of all American Stock Exchanges provide:

1, that only the members of a Stock Exchange shall be permitted on its floor;

2, that during certain hours of every business day the members may deal with one another on the floor;

3, that transactions between members on the floor shall only be in or with certain specified† securities.

4, that only certain kinds of transactions shall be permitted on the floor.

Chief among these permitted transactions is the purchase and sale of securities.‡ The manner in which this is done is regulated by the rules and customs of each Stock Exchange. In general it is the same on all American Stock Exchanges, and is as follows:

During the hours in which trading is permitted to the members of a Stock Exchange they congregate on "the floor" of the Exchange, and are permitted then and there to offer and to accept offers to buy § or to sell securities for a money price. These offers and acceptances are made by word of mouth or merely by customary signs. In making or accepting

* This article is not concerned with the rules and customs of European Stock Exchanges which are different from those of American Stock Exchanges; see Mr. George R. Gibson's book on "The Stock Exchanges of London, Paris, and New York," and his pamphlet on "The Berlin Bourse;" also Dos Passos, Chaps. IV., V., VI.

† These specified securities are placed on a printed list, and hence are known as "listed" securities. In addition to the regular list of securities, some Stock Exchanges allow dealings in a few kinds of other securities, which are said to form a "department" of "unlisted" securities.

‡ The word "security" or "securities" will be used throughout this essay as referring only to such securities as can be dealt in on a Stock Exchange.

§ An offer to buy is technically known as a "bid," and accordingly the verb used is to "bid."

an offer a stockbroker almost invariably acts as if he were acting for himself only,* even though he may actually be acting as an agent, and thus the contract which results when an offer is accepted is on its face a contract only between the two stockbrokers.

Every offer to buy or to sell is required to be for some fixed amount of some particular kind of securities and for a money price, payable on the delivery, according to the rules of the Stock Exchange, of the securities by the selling to the buying stockbroker. A variety of times of delivery, or "deliveries," as they are called, are permitted by the rules of every Stock Exchange, for any one of which an offer† may be made.

Since these offers are *essentially*‡ similar except in point of the delivery, they are classified by that as follows :§

1. Offers to buy or to sell "for cash."

If an offer to buy or to sell "for cash" is accepted, the rules fix a particular time in the *same* business day in which the contract is made, before which delivery of the securities must be made by the seller.

2. Offers to buy or to sell in the "regular way" or "regular."

If an offer to buy or to sell "regular" is accepted, the rules fix a particular time in *some* particular business day

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* If the stockbroker is acting for a fellow-member of his Stock Exchange, he may, if such fellow-member is willing, "declare" or "give up" such fellow-member in his place as a principal if the stockbroker with whom he is contracting does not object. If, however, the stockbroker is acting for an outsider, there is a custom that he cannot declare or give him up as a principal, and that he should at all times carefully conceal his identity. The custom of dealing in this way has been held to be "reasonable;" Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 42 ; Peckham *v.* Ketcham, 10 Abb. Pr. (N. Y.) 220 ; s. c. 5 Bos. (N. Y.) 506 ; Horton *v.* Morgan, 19 N. Y. 170.

† Every offer must expressly or impliedly state for what delivery the securities are offered for purchase or sale.

‡ Differences between orders in the kind, amount, and price of the securities are not properly to be considered *essential* differences.

§ All Stock Exchanges do not allow *all* of the deliveries stated in the text, though the New York Stock Exchange does.

following the day on which the contract is made, before which delivery of the securities must be made by the seller.*

3. Offers to buy or to sell where the time of delivery *is* postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "at three (or two) days." If an offer of this sort is accepted, delivery of the securities must be made by the seller on the third (or second) day after the contract is made, as the case may be, and before a certain time on such day.

4. Offers to buy or to sell where the time of delivery *may* be postponed until a fixed time not further off than three days.

Offers of this sort are offers to buy or to sell "buyer three" (days) or "seller three" (days). An offer to buy or to sell "seller three," if accepted, gives the seller the option of making delivery of the securities at any time before a fixed time on the third day after the contract is made; and an offer to buy or to sell "buyer three," if accepted, gives an option to the buyer of "calling" (demanding delivery of) the securities at any time before a fixed time on the third day after the contract is made.

5. Offers to buy or to sell where the time of delivery *may* be postponed for longer than three days, but not longer than sixty† days.

The commonest form of such offers are offers to buy or to sell securities "buyer thirty" (days) or "seller thirty" (days), or "buyer sixty" (days) or "seller sixty" (days). Such offers, if accepted, give options similar in all respects except that of length of time to those in the case of "buyer three" or "seller three." After offers of this kind are verbally made and accepted they are reduced to writing;‡ such

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* On most Stock Exchanges it is the *next* business day after the day on which the contract is made.

† "Sixty days" is the longest period usually allowed by the rules of Stock Exchanges to which delivery may be postponed.

‡ Since these contracts are in writing, the Statute of Frauds has no application to them; with the others which remain verbal, they are taken out of the Statute by the exchange of "comparison tickets" between the

written contracts are known as "Stock Exchange contracts."*

6. Offers to buy or to sell where the time of delivery is fixed by the happening of some future event.

Common forms of such offers are offers to buy or to sell securities "seller opening of books," "to arrive," or "when issued." If an offer of this kind is accepted, delivery of the securities must be made by the seller as soon as the event stated in the offer happens.

The contracts which result from the acceptance of offers to buy or to sell permitted to be made on the floor of Stock Exchanges must obviously be alike in the matters in which such offers are, and can only differ in the matters in which such offers do. Consequently they are all alike in being contracts to buy or to sell a fixed amount of some particular kind of securities for a money price to be paid on the delivery of the securities, and differ in essentials only with respect to the time when delivery of the securities must or may be made by the seller or may be called by the buyer, which in all cases is postponed until some time after the contract is made.

The legal nature of all these contracts is not difficult to determine. In all of them it is clear that the intention of the parties is to postpone the passing of the title of the securities contracted to be bought or sold *until* they are delivered and the purchase price paid. Hence, as no actual sale of personal property can occur without a complete transfer of title from the seller to the buyer, these contracts do not constitute actual

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stockbrokers, which takes place as soon as possible after the contract is made. This seems to have been overlooked in those cases in which it is stated that these verbal contracts are within the prohibition of the Statute, see Brownson *v.* Chapman, 63 N. Y. 625; *semble* Rogers *v.* Gould, 6 Hun (N. Y.), 229, and Dos Passos, 107, 674, 676. This question is of slight practical importance, as every Stock Exchange enforces its remedies for breach of contract (see *post*, page 6), without regard to the requirements of the Statute of Frauds.

* These contracts are also known as contracts for "future" delivery, in contradistinction to all other deliveries (except that numbered (6) above) which are known as "immediate," though of course this term has only a relative significance.

purchases and sales, but are *contracts to make purchases and sales* at the time when they are to be performed by the delivery of the securities and the payment of the purchase price. All of them are what are called "executory contracts of sale," in which the actual purchase and sale does not take place until the contract is performed. It is, however, usual for stockbrokers to call contracts to buy or to sell securities "for cash," or "regular," "purchases" or "sales," and only to call contracts where the delivery may be postponed for longer than three days, "Stock Exchange contracts" or "*contracts* for the receipt or delivery of securities." Contracts to buy or to sell securities where the time of delivery is or may be postponed until a fixed time not further off than three days stand by themselves. They are never called "contracts," but are usually included under the head of "purchases" or "sales."*

Since stockbrokers in contracting act as principals, each is legally bound† to the other to perform his part under the terms of any contract. If either fails to do so, every Stock Exchange gives to the other an effective and immediate method of liquidating his loss,‡ and will enforce this liquidated claim so far as it is able by suspension of the defaulting stockbroker, and by the sale of his "seat," or share in the Exchange.§ To facilitate stockbrokers in performing the contracts that they make, every Stock Exchange has established rules by which

* The verb generally used *in all cases* is "to buy" or "to sell," instead of "to contract to buy" or "to contract to sell."

† Where a stockbroker contracts in his own name, even though he be actually acting for an undiscovered principal, he can sue and be sued on his contract as a principal, Knapp *v.* Simon, 96 N. Y. 284, s. c., 86 N. Y. 311; Cobb *v.* Knapp, 71 N. Y. 384; Mechem on Agency, §§ 929, 957, 977, 983.

‡ By a so-called purchase or sale "under the rule," see Constitution and Rules of the New York Stock Exchange, Art. XXIX. In consequence of this remedy it is not usual for a member of a Stock Exchange to sue another for a breach of a contract made on its floor, and suits by a customer (the undiscovered principal) against a stockbroker who has defaulted on a contract made with the customer's stockbroker are unheard of.

§ On the nature of a stockbroker's seat *on* an Exchange, see Dos Passos, 17–21.

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the performance* of all contracts made on its floor can be conveniently and expeditiously carried out. In consequence of this, every offer to buy or to sell securities, made on the floor of a Stock Exchange, contains an implied term to the effect that the contract which will result from its being accepted shall be performed according to the rules of such Stock Exchange. It is to be noted that by these rules the actual performance of any contract takes place *away from* the Stock Exchange on the floor of which it is made. In spite of this, it is customary to speak of "buying" and "selling" securities *on* the floor or *on* the Exchange, and also of purchases and sales being made *on* the floor or *on* the Exchange, where it would be more proper to speak of *contracting* to buy or to sell on the floor or on the Exchange, and of *contracts* for the purchase and sale of securities being made on the floor or on the Exchange.

The manner in which American Stock Exchanges permit their members to deal on "the floor" for the purchase and sale of securities has now been described.

By means of the different deliveries which have been described, stockbrokers can effect purchases and sales to take place at a variety of times for customers who may wish to employ them. The simplest of these transactions is a purchase for a customer who has money which he wishes to invest in securities as soon as possible, or a sale for a customer who has securities whose value in cash he wishes to get as soon as possible. Such a transaction is called an outright or simple purchase or sale, or, more technically, a purchase or sale for "the investment account." The way this transaction is performed is as follows: The first step is for the stockbroker to contract† on the floor of the Stock Exchange to buy

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* Subject to the rules of each Stock Exchange, this is done either directly by and between the two stockbrokers or through a Clearing House acting as the agent of both. On Stock Exchange Clearing Houses, see article, by Alexander D. Noyes, in *Pol. Sc. Quarterly*, Vol. VIII. No. 2, p. 252, June, 1893. Among other matters the rules prescribe what shall be "good" delivery of securities as between two contracting stockbrokers.

† He makes one contract, or as many contracts with the same or differ-

or to sell the securities the customer wishes bought or sold, either "for cash" or "in the regular way,"* as the customer may prefer. The stockbroker contracts, as has been stated, in his own name, and becomes personally bound to perform the contract or contracts he makes. If he performs with the securities the customer wishes to sell or with the money he wishes to invest it is obvious the customer's desires will be fulfilled. This is, of course, what the customer intends he should do. For as soon as the stockbroker has contracted the customer supplies† him with the means to perform by either giving him the money to pay for the securities he has contracted to buy or the securities to deliver which he has contracted to sell. The stockbroker then performs his part of the contract or contracts he has made, and should simultaneously receive from the stockbroker or stockbrokers with whom he has contracted the securities he agreed to buy or the purchase price for the securities he agreed to sell. He then accounts to the customer, and gives him the money or the securities he has received. This completes the transaction so far as the purchase or sale of the securities is concerned. The stockbroker, however, must be paid for his services. Even if he were willing to act without compensation he cannot do so, for the rules of all Stock Exchanges provide that a stockbroker must *at least*‡ charge and be paid a certain fixed sum for every transaction he makes on behalf of any other person, and impose a severe penalty for any violation of this provision.§ This sum is called the stockbroker's commission, and is a fixed percentage of the par value of the securities contracted to be bought or sold. It is usually

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ent stockbrokers as may be necessary to carry out what the customer wants. See *post*, page 21.

* The price of securities offered "for cash" is always slightly different than when offered "regular."

† He may have done so, and often is required to do so, at the very beginning of the transaction. See *post*, page 13.

‡ The stockbroker has the right to ask for remuneration in excess of his commission, but it is practically unheard of for him to do so.

§ On a stockbroker's commission, see Dos Passos, 231-235.

provided* that the stockbroker must at least charge and be paid this commission without any manner of rebate or return, discount or allowance "on all purchases and sales" and contracts which he makes on the floor of the Stock Exchange. The words "purchases and sales" are here used† with the significance of contracts to buy or to sell, and consequently the customer must in all cases be prepared to pay this commission *when* the stockbroker has contracted to buy or to sell. In practice, however, the stockbroker does not usually require him to pay it until he has fully performed the contract or contracts he has made, and for his services in so performing the stockbroker makes no additional charge.‡

I now propose to consider *the engagement* § of a stockbroker by a customer who wishes a simple purchase or sale of securities to be effected on the Stock Exchange to which the stockbroker belongs. Since this can only be done in the way and on the terms described, the engagement must be adapted to meet the requirements of this way and these terms. And from this point of view the following matters are requisite to every such engagement :

1. Since the stockbroker acts as the agent of the customer, he must be vested with authority to buy or to sell the securities the customer wants in the manner described. This way naturally falls into two parts, (*a*) the contracting to buy or to sell, and (*b*) the performance of the contract or contracts when made, both of which are done by the stockbroker and both of which must consequently be embraced by his authority.

2. Since the stockbroker performs with the money or securities of his customer, provision must be made for his being

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* Cf. Constitution and Rules of the New York Stock Exchange, Art. XLIII.

† See *ante*, page 6.

‡ For unsuccessful efforts in trying to contract the stockbroker makes no charge, see Dos Passos, 233. This is the general rule respecting brokers of every kind, see Sibbald *v.* The Bethlehem Iron Co., 83 N. Y. 378.

§ The engagement of a stockbroker *as agent* to buy or to sell securities, except some peculiar engagement not to be performed within a year, does not come within the Statute of Frauds.

supplied with the money or the securities. This usually takes either the form of a deposit *at the time* the stockbroker is engaged, or, as the making of the contract or contracts is always uncertain, of an offer to supply the money or the securities *on* the making of the contract or contracts.

3. Since the stockbroker must be paid a commission, on terms and in amount as are fixed by the rules of his Stock Exchange, provision must be made for the payment by the customer of this commission according to the requirements of these rules. This usually takes the form of a simple promise by the customer to do so.

Subject to these requisites the stockbroker may be engaged in any way he and the customer may agree upon, and all kinds of promises, provisos, and conditions may be made part of his engagement. There has been established, however, a convenient, brief, and customary way of engaging a stockbroker to carry out a simple purchase and sale of securities. This way is almost always used except where a customer is ignorant of it or peculiar circumstances exist which force the adoption of some other form of engagement. I now propose to describe this mode of engagement, its legal consequences, the rights of the parties, and how in point of fact the transaction is carried out under its terms.

The Order.—The first step is for the customer to give the stockbroker, either verbally or in writing, an "order" to buy or to sell securities for "regular delivery," for which there is a regular form.* This is, "Buy or sell for my account and risk," followed by a statement, which is usually briefly and customarily worded, of the securities which the customer wishes to buy or to sell, and the price at which he wishes them to be bought or sold. To illustrate, a typical

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* The word "order" will be used throughout this article as signifying only an order in the regular form. The word "order" is commonly used by stockbrokers as signifying any kind of a proposition relating to the purchase or sale of securities. Evidence is admissible to show a written order was changed by a subsequent verbal understanding, Clarke *v.* Meigs, 10 Bosw. (N. Y.) 337; Bickett *v.* Taylor, 55 How. Pr. (N. Y.) 188.

order in the regular form would be, "Buy for my account and risk 100 C. B. & Q. at 71."

Technical words are used and technical meanings are attributed, and customs have been established in the business of stockbrokers. So far as these customs, technical words and technical meanings apply to the wording of orders* in the regular form, they must be described before the full meaning of an order like this typical one can be apprehended.

1. The word "buy" or "sell," as used in an order in the regular form given to a stockbroker who is a member of a Stock Exchange, is taken to mean "contract to buy" or "contract to sell† on the Stock Exchange of which you are a member according to its rules and customs."‡

2. The words "for me" or "for my account," as used in an order in the regular form, are taken to mean that the contract the stockbroker is directed to make is to be made for and on behalf of the customer.

3. The words "at my risk," as used in an order in the regular form, have the customary significance that the customer assumes the risk of any failure to perform on the part of the stockbroker or stockbrokers with whom his stockbroker contracts, and that he does not require the latter to guarantee in any way that the contract or contracts which he makes will be performed by the stockbroker or stockbrokers with whom he contracts. If these words are omitted in an order in the regular form, as they may be, they are implied by force of custom.

4. When an order in the regular form does not state a particular delivery for which the securities are (to be contracted)

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* These customs, technical words, and technical meanings apply, *mutatis mutandis*, to other things besides orders in the regular form; for instance, to the wording of notices (see *post*, page 23) given by stockbrokers to their customers; but for the purposes of this essay the exact scope of these customs need not be considered.

† See *ante*, page 6, note *.

‡ For two cases illustrating the nature and extent of this custom, see Rosenstock *v.* Tormey, 32 Md. 169 and Porter *v.* Wormser, 94 N. Y. 341; see also Dos Passos, 206–212.

to be bought or sold, it is taken to mean that they shall be contracted to be bought or sold for "regular" delivery.

5. A large number of abbreviations of the full names of corporations and for various kinds of securities are customarily used among stockbrokers. When any of these abbreviations are used in an order in the regular form, they are taken for what they stand for to stockbrokers.

6. Where an order in the regular form simply states a number before the name or the customary abbreviation for the name of a corporation, as, "Sell for my account and risk 100 Union Pacific," the number in question is taken to mean the number of shares of the capital stock of the corporation named which shall be (contracted to be) bought or sold.

7. Where an order in the regular form simply states a number at which a number of bonds or shares of stock is to be bought or sold, as, "Sell for my account and risk 100 Erie at 13," the number in question is taken to mean the number of dollars for which each hundred dollars' worth of the par value of the bonds or stock shall be (contracted to be) bought or sold,* subject to the following custom :

That where a particular price is stated in an order in the regular form, the words "or better" are read in after it; by which it is understood that the price stated is fixed as the price at which the securities shall be (contracted to be) bought or sold, unless a better price—*i.e.*, a lower in case of a purchase, a higher in case of a sale—is obtainable, in which case they shall be (contracted to be) bought or sold at such better price.

8. Where no price is stated in figures in an order in the regular form, but the securities are ordered to be (contracted to be) bought or sold "at the market price" or "at the market," it is taken to mean that the securities are to be contracted to be bought or sold for the best price—*i.e*, the lowest in case of a purchase, highest in case of a sale—obtainable.

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* The reason for this custom is that shares of stock and bonds are contracted to be bought and sold on the floor of a Stock Exchange for so much for each hundred dollars' worth of the par value.

9. Where an order in the regular form does not state anything at all about the price for which securities are (to be contracted) to be bought or sold, the order is taken to mean that the securities shall be contracted to be bought or sold at the "market price," the meaning of which has just been explained.*

Interpreting according to these customs, technical words and meanings, the order taken as typical, "Buy for my account and risk 100 C. B. & Q. at 71," it becomes, "I order you to contract to buy for regular delivery for me and at my risk on the Stock Exchange of which you are a member, according to its rules and customs, 100 shares of the stock of the Chicago, Burlington and Quincy Railroad at 71 dollars, or better, for every hundred dollars' worth of the par value of the shares."

The Taking of an Order.—After an order of this kind is given to a stockbroker, the next step in his engagement is for him to decide whether he will refuse it† or not. If he does not wish to refuse, he may express his willingness to undertake what he is ordered. *Such an expression of willingness* is called "taking" the order.

This is *all* the stockbroker usually expresses at the time of taking an order, except that, where he has not entire confidence in his customer's responsibility, he asks him to deposit with him the securities he wants to sell or the money he wants to invest.

This giving and taking of an order of the kind described, with or without a deposit of money or securities, constitute the whole of the customary form of engagement of a stockbroker to carry out a simple purchase or sale of securities.

I will now assume that a customer has given an order like the one taken as typical, "Buy for my account and risk 100 C. B. & Q. at 71" to a stockbroker and the stockbroker has

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* Dos Passos, 119, 182; Mechem on Agency, §§ 362, 946; Bigelow *v.* Walker, 24 Vt. 149.

† The stockbroker can refuse any order he wants to; except by the terms of some special contract he is under no obligation to take an order.

taken it, and I will state what the legal effect of such an engagement is.

The Legal Nature of the Order.—Stockbrokers form a particular class of semi-public agents, and as such hold themselves out as ready to act as agents for any who will employ them. Obviously the order is a proposition to vest the stockbroker with an agency. As between the principal and the agent, the scope of every agency depends on the principal's intent. I will assume* that the customer's intent in giving the order is that it should be interpreted according to the customs, technical words and technical meanings which have been stated. It will therefore bear the full significance stated above, and will be found to contain :

1. A proposition to make the stockbroker the customer's agent with authority,

(*a*) to contract † to buy or to sell, according to the rules and customs of the Stock Exchange of which the stockbroker is a member, the securities stated in the order on the terms there stated ;

(*b*) to perform in the way established by the rules of the Stock Exchange of which the stockbroker is a member the contract or contracts made under the authority to contract.

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* This assumption is made in order to avoid any discussion of the legal rules governing the interpretation of orders by courts of law where the customer's intent is in dispute. The law is in by no means a satisfactory condition respecting how far such customs as have been described in the text can be proved in evidence and their effect upon the interpretation of an order when so proved. It follows that a stockbroker's only safety lies in bringing these customs to the customer's knowledge and having the customer clearly express the full significance of his order. This is all the more necessary where the customer is, as is usual, ignorant of these customs. For a large collection of cases on the interpretation of the engagements of stockbrokers according to custom and an intelligent discussion of this question, see Dos Passos, Chap. VII. p. 341 ; see also Harris *v.* Tumbridge, 83 N. Y. 92, aff. 8 Abb. N. C. (N. Y.) 291 ; Horton *v.* Morgan, 19 N. Y. 170 ; Whitehouse *v.* Moore, 13 Abb. Pr. Rep. (N. Y.) 142 ; Skiff *v.* Stoddard, 21 Law Rep. Ann. 102, on p. 112 ; cf. Daylight Burner Co. *v.* Odlin, 51 N. H. 56 ; Putnam *v.* French, 53 Vt. 402.

† Since this authority is "*to contract*," it permits of the stockbroker making as many separate contracts with one or more stockbrokers as may be necessary to buy or to sell the securities stated in the order

The former of these authorities is clearly expressed in the order. The latter must be implied, but the ground for its implication is solid, and is that the customer must be held to propose to authorize the necessary consequences of what he expressly proposes to authorize, and personal performance by the stockbroker of the contract or contracts he makes is a necessary consequence * of making it or them, as it is expressly proposed he should do, according to the rules and customs of his Stock Exchange.†

2. An implied offer by the customer that if the stockbroker becomes the customer's agent, as proposed by the order, and in consideration of doing so,‡ the customer will reimburse and indemnify him for all outlays, expenses, liabilities and losses necessarily or reasonably incurred in so acting as agent.§ This offer obviously involves an offer to supply the stockbroker with the securities or money needed to perform in the event of his contracting to buy or to sell.

3. An implied offer by the customer to pay the stockbroker a commission in accordance with the requirements of the rules of his Stock Exchange.‖

These requirements are that the stockbroker shall be paid a fixed commission for every contract he makes on the floor of the Stock Exchange to which he belongs. Hence, the customer's implied offer is to pay the stockbroker the usual com-

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* See *ante*, pages 3 and 7.

† A further ground lies in a deposit with the stockbroker of the means to perform, which is often made at the time the order is given.

‡ In my article in the *Harvard Law Review*, Vol. VIII., No. 8, I stated that this offer was made in consideration of the stockbroker *contracting* as he was authorized to do. I was wrong. The text here is right.

§ Dos Passos, 129–135; Duncan *v.* Hill, L. R. 8 Ex. 242, rev'g L. R. 6 Ex. 255; Mechem on Agency, § 977. An offer to indemnify the agent is implied by law in all propositions to confer authority to act for a principal, Mechem on Agency, § 365; Daylight Burner Co. *v.* Odlin, 51 N. H. 56; Bennett *v.* Covington, 22 Fed. Rep. 816; Putnam *v.* French, 53 Vt. 402.

‖ Dos Passos, 231, 232. Cf. "Where there is no express agreement as to the compensation of an agent, usage if any will determine what he should receive," United States *v.* Duval, Gilp. 356; Morgan *v.* Mason, 4 E. D. Smith (N. Y.), 636; Mechem on Agency, § 963.

mission in consideration of and on the making of any contract or contracts to buy or to sell he may make to carry out the order. Hence this offer remains as made, and unaffected by anything the stockbroker may do until he has *actually contracted* * *to buy or to sell* the securities. Then by the performance of what the customer offered to pay for, the customer's offer to pay a commission ripens into a promise to do so. In this way a contract springs into existence binding the customer to pay the fixed commission. This contract is of the unilateral or executed variety.

This is the whole legal significance of the order.

The Legal Effect of "Taking" the Order.—"Taking" an order has been defined to consist merely in an expression of willingness on the part of the stockbroker to undertake the order. The legal effect of such a "taking" is to constitute the stockbroker the customer's agent, and to vest in him the authorities proposed by the order,† and also to turn the customer's offer to indemnify the stockbroker into a promise to do so; but it has no effect upon the customer's offer to pay a commission.

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* Thus the question of whether the stockbroker has earned his commission is easy of determination, and the difficulties which arise with it in the case of real-estate brokers do not exist, Mechem, § 965.

† Where a proposition to confer an authority is made, all that is required to create the relation of principal and agent between the proposer and the person to whom the proposition is made is that the latter should consent to the proposition. His consent need not be necessarily communicated to the proposer, it may be inferred from his conduct, see Mechem on Agency, § 108. So too a refusal to consent to a proposition to confer an agency need not be communicated, but can be left to be inferred. Since it is very easy, except in clear cases, for error to arise in inferring what a stockbroker means, where he remains silent, the wiser course is for him always to *communicate* his consent or refusal to his customer. This is practically essential in the case of an intended refusal, for from silence after receiving an order consent rather than refusal will almost invariably be inferred. The practical wisdom of notifying the customer that an order is refused has led some stockbrokers to think that they are "bound" to do so, and they act accordingly; but the law is clearly as stated, and there does not seem to be any established custom of notifying a customer of the refusal of an order. In communicating his refusal or consent, the stockbroker can express the one or the other in any way he likes.

That remains an offer until the securities are contracted to be bought or sold.

Sometimes, though rarely, the stockbroker, in addition to expressing his willingness to undertake an order, expressly promises, in consideration of the customer's giving him the order, to act as the customer's agent.* It is not unusual to find such a promise expressed in words, and it is usual for courts of law to imply it in all cases where an order is "taken." It can, however, be properly implied only in a case where there is communication † between the stockbroker and the customer, on the taking of the order, sufficient to warrant the implication. This is often absent, as where an order is sent by mail and the stockbroker, without notifying the customer of his taking the order, at once proceeds to carry it out, and in such a case no such promise can be implied. The only effect of such a promise is to add to the stockbroker's status as agent, created by the mere "taking" of the order, a contractual obligation on his part to act as agent. This makes no difference in the rights and duties of the customer and stock broker as principal and agent, for whether they spring from status alone or from status *and* a contract to act as agent they are the same, except that in the latter case there is a liability sounding in *contract* for any default in addition to the ever-present liability in tort.

The Legal Effect of the Whole Engagement.—It follows from what has been said that the whole result of the usual engagement of a stockbroker, consisting in the giving of an order and the "taking" of it, accompanied by or without an express or implied promise to act as agent, is to create an agency coupled with an offer to pay a commission and a promise to indemnify the stockbroker.

The deposit of the securities to be sold or the money to be

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* This makes an ordinary unilateral *contract of agency*. It is to be noticed that in this regular form of engagement a promise *to carry out the order* cannot be found. A stockbroker will rarely if ever give such a promise, as he never can be absolutely certain of being able to contract.

† A contract implied in fact is as dependent on communication of some kind between the offeror and the offeree as an express contract.

invested at the time the order is given does not change this result. It merely adds a collateral arrangement of security. It provides in advance the securities or money which the stockbroker will need in case he contracts. This deposit must, of course, be at once returned by the stockbroker to the customer in case he fails to contract.

Where the securities or the moneys are not deposited at the time of giving the order, the stockbroker relies upon the customer's promise to supply the securities or money in case the stockbroker contracts, which, as has been stated, is involved in the customer's promise to indemnify the stockbroker against loss and liability.*

It can now be seen that this customary mode of engagement meets all the three requirements which on an earlier page were laid down as necessary to every engagement of a stockbroker to buy or sell securities according to the rules of American Stock Exchanges.

Assuming now that a stockbroker has been engaged by his taking an order like the one given above as typical, I will state according to what legal principles and how as matter of fact he must thereafter act to correctly carry out his engagement.

Of the Carrying out of the Order.—The relation between the customer and stockbroker created by the usual engagement being that of principal and agent, the principles of the law of agency govern its carrying out. If in any case the stockbroker carries out the order according to the intent of the customer, the customer is bound.† If, on the other hand, the stockbroker fails to carry out the order according to the customer's intention, the customer is not bound.‡ In such a case

* If the customer should break his promise the stockbroker will have to make good and perform the contract or contracts he has made to avoid the penalties his Stock Exchange imposes on a defaulting member. Having done so, he can recover his loss from his customer in a suit upon his customer's promise to indemnify him.

† This is the meaning of his having "authority." See *post*, page 21.

‡ Allen *v.* McConihe, 124 N. Y. 342; Campbell *v.* Wright, 118 N. Y. 594; Gruman *v.* Smith, 81 N. Y. 25; Scott *v.* Rogers, 31 N. Y. 676.

he is not bound to take any steps to assert this.* On the other hand, if he chooses to he can ratify what has been done contrary to his intention.† Ratification rests on the consent of the customer to be bound. Therefore he should as a matter of precaution repudiate anything done contrary to his intention in order that his silence may not be taken and used as evidence of consent.‡

Another principle of the law of agency is, that the law requires § of one who undertakes an agency that he should exercise due care ‖ in and about what he is entrusted to do, and to act in good faith ¶ toward his principal. If he fails in either direction he will be liable in damages.

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* Allen *v.* McConihe, 124 N. Y. 342; Gregory *v.* Wendell, 40 Mich. 432.

† Gillett *v.* Whiting, 120 N. Y. 402; Harris *v.* Tumbridge, 83 N. Y. 92; Taussig *v.* Hart, 49 N. Y. 301; Brass *v.* Work, 40 Barb. (N. Y.) 648; Dos Passos, 212.

‡ Baker *v.* Drake, 53 N. Y. 211; Hanks *v.* Drake, 49 Barb. (N. Y.) 186.

§ Harris *v.* Tumbridge, 83 N. Y. 92; Mechem on Agency, §§ 951–954, 454–472.

‖ The degree of care which a stockbroker must show is to be measured by the standard of care which a faithful and intelligent stockbroker would show. It is not to be measured by the degree of care which is customary, or which stockbrokers usually give, unless such degree of care is that which an intelligent and faithful stockbroker would show. Cf. William *v.* Hays, 143 N. Y. 442, on pp. 453, 454; Dos Passos, 123–136.

¶ This duty is very stringently enforced. In doing so judges incline to lay down general rules of conduct rather than to decide each case on its merits. Thus the rule is established and enforced without exception that a stockbroker cannot sell to or buy, from *himself;* Porter *v.* Wormser, 94 N. Y. 431; Levy *v.* Loeb, 89 N. Y. 386; s. c. 85 N. Y. 365; 47 N. Y. Super. Ct. 61; Taussig *v.* Hart, 58 N. Y. 425; Day *v.* Holmes, 103 Mass. 306;—from *his clerk;* Gardner *v.* Ogden, 22 N. Y. 327;—from *a firm or corporation of which he is* a member; Francis *v.* Kerker, 85 Ill. 190; Solomons *v.* Pender, 3 H. & C. 639;—and this without proof of fraud; Porter *v.* Wormser, 94 N. Y. 431; Gardner *v.* Ogden, 22 N. Y. 327;—and even in case where the price obtained or given by the customer is as good or better than would otherwise have been obtained or paid; Taussig *v.* Hart, 58 N. Y. 425; Gardner *v.* Ogden, 22 N. Y. 327; Connor *v.* Black, 24 S. W. (Mo.) Rep. 184. There is no custom among stockbrokers of violating this rule of law; cf. Robinson *v.* Mollett, L. R. 7 H. L. App. Cases, 802. On this whole note, see Dos Passos, 123, 124, 213–226, 280–286; Mechem on Agency, § 936, and cases cited.

These are the main principles of the law of agency which govern the carrying out of the order.

How, now, as matter of *fact*, does a stockbroker carry out the order, assuming the customer's intention to be that the order shall be interpreted according to the customs, technical meanings and technical words already stated? He is authorized first to contract. This authority is qualified by two customs. Before stating them it is necessary to explain that the "execution" of an order consists only of *the contracting* to buy or to sell the securities ordered upon the terms of the order, and an order is said to be "executed" when this is done. In other words, the "execution" of an order is the carrying out of the authority to contract.* The two customs are:

1. An order in the regular form to buy or to sell securities can only be "executed," if at all, on the day it is given, unless it is expressly stated in the order that it is "good" for a longer period † of time or for some particular period of time.‡

2. There is implied, as a term or condition proposed by an order in the regular form, that the stockbroker shall try to "execute" the order as early in the time for which it is "good," as it is possible for him to do in accordance with the rules and customs of the Stock Exchange to which he belongs.

Assuming § that the customer's intention is that these two customs should apply to the order, it follows that the stockbroker's first step is to try to execute the order at the earliest possible moment in the time it is good for. If he neglects this duty, he will be liable in damages.

Now, unless he carries out the terms of the order *exactly* the customer will not be bound, and the stockbroker will presumptively be liable for want of care. For unless given dis-

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* Lettered (*a*) on page 14.

† This custom is opposed to the rule that an authority is good till countermanded, if such a rule exists. Cf. Dickenson *v.* Tilwall, 1 Stark. 128, s. c. 4 Campb. 279. Mr. Dos Passos seems to be ignorant of this custom, Dos Passos, 120.

‡ In such a case it is usually made "good till countermanded," which is usually abbreviated, when written, to G. T. C.

§ See *ante*, page 14, note *.

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cretion * the stockbroker cannot vary † in any particular from the terms of an order, even where he benefits ‡ the customer by so doing. Hence, he § will try to contract to buy or to sell according to the rules and customs of his Stock Exchange the exact amount of the particular kind of security stated in the order at the price or better, if any is fixed, or, if no price is fixed, at the highest market price for regular delivery. The manner of buying or selling prescribed by the rules need not be described here, for it would be merely restating what has already been stated at the beginning of this article in the description there given of the way stockbrokers deal together according to the rules and customs of American Stock Exchanges. The stockbroker can make one contract, or as many contracts ‖

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* Allen *v.* McConihe, 12 N. Y. Supp. 232. As to what phrase will give him a discretionary power: "Do the best you can for me," see Covell *v.* Loud, 135 Mass. 41, s. c. 46 Am. Rep. 446; "You must take care of yourselves," see Cameron *v.* Durkheim, 55 N. Y. 425; cf. also Billingslea *v.* Smith, 77 Md. 504. Good intentions on the stockbroker's part are no excuse in law for failure to carry out orders, Allen *v.* McConihe, 12 N. Y. Supp. 232.

† An order to purchase at 57⅛ is not fulfilled by a purchase at 57⅞ or 58. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213; cf. Day *v.* Holmes, 103 Mass. 306 and Pickering *v.* Demerritt, 100 Mass. 416. The same thing would be true of an order to sell. An order to buy "regular" is not fulfilled by a purchase at thirty days seller's option, Taussig *v.* Hart, 58 N. Y. 425. An order to sell wheat on a *particular* day is not fulfilled by a sale on the following day, Scott *v.* Rogers, 31 N. Y. 676.

‡ Unless the customer ratifies and accepts it. Thus the stockbroker has no right to buy or to sell, where the price is *fixed*, at a better price, Nesbitt *v.* Hesler, 49 Mo. 383; Smith *v.* Bouvier, 70 Pa. St. 325; Borham *v.* Godfrey, 1 Knapp, 381; Dos Passos, 167; but see *ante*, page 12.

§ In spite of the maxim *Delegata potestas non potest delegari*, custom permits a stockbroker to delegate the execution of an order to some other stockbroker, Dos Passos, 104, 230, 231; Green *v.* Johnson, 90 Pa. St. 38; Gregory *v.* Wendell, 40 Mich. 432; Rosenstock *v.* Tormey, 32 Md. 169. This custom does not, however, apply where reliance is expressly or impliedly put in a particular stockbroker's skill to execute an order. The stockbroker can also delegate to his clerk the doing of the acts constituting *performance* of the contract or contracts made, Mechem on Agency, § 944. Where, however, anything is left to the stockbroker's discretion, he must exercise his personal judgment, Sims *v.* May, 16 N. Y. St. Rep. 780.

‖ His authority being "to contract," see *ante*, page 14, note †.

with the same or different stockbrokers, as may be necessary or advisable, provided that the total amount * of securities contracted to be bought or sold is the amount stated in the order. In so contracting the stockbroker can either make an offer or offers to be accepted, or accept an offer or offers made by another stockbroker or other stockbrokers, provided that the offer or offers if accepted will result in contracting to buy or to sell securities according to the terms of the customer's order. As already stated, if in any case the stockbroker succeeds in *contracting to buy or to sell as he is ordered* to, he is said to have "executed" the order, and the order is said to be or to have been "executed."† And this is so, although the actual performance of the contract or contracts by the delivery of the securities and the payment of the price has yet to come.

The Commission.—When the stockbroker has contracted to buy or to sell according to the terms of the order, the customer's offer to pay him a commission according to the rules of the Stock Exchange to which the stockbroker belongs ripens into a promise to do so. The customer is not bound to volunteer to pay it. He can wait until the stockbroker asks him for it. The stockbroker does not usually demand it of the customer at this time, but charges it against him and waits for it until he accounts to the customer.

The Notice.—There is a custom that the stockbroker as soon as he can after "executing" an order, should give or send ‡

* No custom exists allowing a stockbroker to contract to buy or to sell a less amount of securities than he is ordered to in a case where no discretion is given to him to do so. This discretion is, however, usually given with all orders to buy or to sell more than 100 shares or 10 bonds, and the number of shares or bonds stated in the order is in such case treated as a limit to be reached if possible, Dos Passos, 119, 120; Marye *v.* Strouse, 5 Fed. Rep. 483; where the discretion is given, the order is said to be "executed" for as many shares or bonds as are contracted to be bought or sold.

† Until the stockbroker has done something to bind the customer, viz. "execute" the order, an order can be revoked, Dos Passos, 120, 121, 165. On the general principles governing the revocation of orders given to brokers, see Sibbald *v.* The Bethlehem Iron Co., 83 N. Y. 378; Mechem on Agency, §§ 204, 968.

‡ The notice must be given to the customer in such a way that knowledge of its contents can be imputed fairly to him. To do this it would be

to the customer a written notice* of what he has done. Where it is the customer's intent † that this custom should apply, the law will enforce it as a term of the stockbroker's agency, and will require that the notice shall be given.‡ The stockbroker need not follow any particular form in giving this notice. There is, however, a customary form which is almost always used. This states exactly what kind of contract or contracts the broker has made, the date on which it or they were made, and gives in addition the name of the stockbroker with whom the contract or contracts has or have been made. As regards the wording of such a notice, the same customs, technical words and technical meanings which are used in the wording of an order in the regular form are made use of in the same way, *mutatis mutandis.* Since these customs have been stated, they need not be repeated here. A notice which would be typical would read :

"June 26th, 1895.

"I have sold for your account and risk 100 C. B. & Q. at 85 to Brown.

(Signed) "E. C. Smith."

The Performance of the Contract or Contracts.—If the stockbroker has not previously demanded and received from

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held in most jurisdictions that mailing to the customer the notice properly addressed and postage prepaid, or leaving it at his business office or home, was sufficient, without proof that the notice reached him, where there was no evidence that it did *not* reach him. In Granite Bank *v.* Ayers, 33 Mass. 392, Shaw, C. J., lays down the rule that "all notices at one's domicile, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be a good constructive notice, and to have the legal effect of actual notice." Subject to this rule of law, the question whether the customer was notified or not is a question for the jury, Minor *v.* Beveridge, 141 N. Y. 399.

* Finney *v.* Gallaudet, 15 Daly (N. Y.), 66 ; Hoffman *v.* Livingstone, 46 N. Y. Super. Ct. 552 ; Cameron *v.* Durkheim, 55 N. Y. 425 ; Dos Passos, 190. The stockbroker is permitted to give evidence that a notice contained errors, Porter *v.* Wormser, 96 N. Y. 431.

† See *ante*, page 14, note *.

‡ In Hoffman *v.* Livingstone, 46 N. Y. Superior Court, 552, it was decided that a failure to give this notice was such "negligence" on the part of the stockbroker as to preclude him from recovering his commissions.

the customer the means to perform the contract or contracts he has made, he will demand them at the time he notifies the customer of the "execution" of the order, or as soon thereafter as he needs them. The customer is bound * to comply with this demand by reason of his offer and promise to indemnify the stockbroker against all liability in consideration of his taking the order.

As already stated, the stockbroker has authority to perform in the regular way the contract or contracts he has made, which authority is dormant, till the contract or contracts is or are made, and comes to nothing if the stockbroker fails to "execute" the order. This authority is created by "taking" the order, and where at that time there is no communication from the stockbroker to the customer it can only rest on his status as agent, and no contractual obligation to act as the customer's agent can be implied. But a contractual obligation can be implied, and will usually be implied from the deposit, at the stockbroker's implied or express request, of the means to perform by the customer either at the time of the "taking" of the order or after its execution. In the latter case a second agency to perform in the regular way will be created. It is not usual to find an express promise that the stockbroker will act as the customer's agent in performing. Nor is it usual to find at any point in the engagement of the stockbroker any express obligation binding him to perform

* If the customer fails to supply the means to perform, the stockbroker can perform with his own means, Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Cobb *v.* Knapp, 71 N. Y. 384; Markham *v.* Jaudon, 49 Barb. (N. Y.) 462, by Leonard, P. J., on page 465; Sistare *v.* Best, 16 Hun (N. Y.) 611; Rosenstock *v.* Tormey, 32 Md. 169, s. c. 3 Am. Rep. 126; Giddings *v.* Sears, 103 Mass. 311; Mechem on Agency, §§ 977, 365; Daylight Burner Co. *v.* Odlin, 51 N. H. 56; Bennett *v.* Covington, 22 Fed. Rep. 816; Putnam *v.* French, 53 Vt. 402. In such a case, the stockbroker can, if he has bought securities, resell them without notice or tender, and charge the customer with the loss, if any, Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 142; Markham *v.* Jaudon, 49 Barb. (N. Y.) 462, on page 465; or he can hold the stock for the customer's account, and sue for what he had to pay—*i.e.*, the original purchase price, Giddings *v.* Sears, 103 Mass. 311; Knapp *v.* Simon, 96 N. Y. 284, s. c. 86 N. Y. 311; Bennett *v.* Covington, 22 Fed. Rep. 816.

the contract. It might be thought requisite that such an obligation should be created. If it were required it would be for the customer's protection, and it is not necessary for that. First, because of the stockbroker's duty to act in good faith and with due care, which arises, as has been stated, from his agency to perform ; and secondly, because the stockbroker, in order to relieve himself from the personal liability he assumes in contracting as he does in his own name, is always ready, without being under any obligation to the customer to do so, to perform any contract he may make on behalf of a customer if the customer supplies him with the means to do so.

It does not seem necessary to describe the actual steps the stockbroker takes to perform in the regular way a contract or contracts he has made on behalf of a customer.* In this, as in every other part of his agency, he must exercise due care and show good faith. On performing he must of course receive the securities which he contracted to buy where the customer ordered securities bought, and the price in money he contracted to sell for where the customer ordered securities sold.† Since he actually receives these as the agent of his customer, it is his duty to account ‡ for them promptly to the customer. This completes the transaction.

I have now described the customary form of engagement where a customer wishes to buy or sell securities for regular delivery, its legal consequences, the rights of the parties, and how in point of fact the transaction is carried out under its terms.

Where a customer wishes to buy or to sell securities for

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* This duty is not affected by the fact that for acting as agent in performing, the stockbroker receives no pay, Isham *v.* Post, 141 N. Y. 100.

† It is said that as "brokers" do not have their principals' property intrusted to them, they have no lien, Mechem on Agency, § 979. But as *stock*brokers do have their principals' property delivered to them, it would seem that they, like factors, to whom in many respects they may be compared, have a lien for their commissions, etc.

‡ On the duty to account, see Mechem on Agency, §§ 955, 522. It is part of the stockbroker's duty, where he buys shares, to have them transferred into the customer's name. On what will excuse him from so doing, see Horton *v.* Morgan, 19 N. Y. 170.

"cash" instead of for regular delivery, the same customary form of engagement is used. The only difference is that the order must state that the securities are to be bought or sold for "cash." It follows that the consequences of this engagement, the rights of the parties and the way in point of fact in which it is carried out, are the same as have been described, with the exception that the time of delivery is different.

The same is usually true where a customer desires to buy or sell securities and to postpone the delivery for not longer than three days; and likewise where he wishes to buy or sell securities granting or reserving an option of delivering or calling for the delivery of the securities at any time within three days.*

New York. ELIOT NORTON.

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* It does not fall within the scope of this essay to treat of buying or selling securities for "future delivery." In general a similar form of engagement to that described above is used, but there are important differences and additions chiefly arising from the deposit of margin by each of the contracting stockbrokers and by a customer with his stockbroker. Nor is it possible to here treat of buying or selling securities for immediate delivery on a margin.

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